IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. _____

STATE OF WASHINGTON,

Petitioner,

v

JOHN MURRAY, also known as JOHN TERRY,
and
LINDA SIMPSON, also known as LINDA TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

On behalf of the State of Washington, the Prosecuting Attorney for Spokane County, Washington, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINION BELOW

The opinion of the Supreme Court of Washington is found in 84 W.D.2d 527, (App. A, infra), which affirmed the decision of Division III of the Washington Court of Appeals found in 8 Wn.App. 944, 509 P.2d 1003 (1973), (App. B, infra).

JURISDICTION

The opinion of the Supreme Court of Washington was filed on November 7, 1974 and became a final judgment on December 18, 1974, on which date the Petition for Rehearing was denied (App. C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether or not the mere tipping of a television set and copying the serial numbers by police officers, who are in a place where they have a right to be, constitutes a "seizure" under the Fourth Amendment to the United States Constitution.

2. Whether or not, assuming such conduct constitutes a seizure, it was unreasonable under the Fourth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. ..."

STATEMENT OF THE CASE

The appellants' appeal in this case was predicated solely on the failure of the lower Court to grant their pretrial motion to suppress evidence, a portable Sony television, which they contended was obtained by an unlawful search and seizure. References to the Statement of Facts given at the pretrial motion to suppress will be made by using the initials (R Mt.); while any citations to the Statment of the Facts given at the trial itself will be made with the initials (R St.).

On August 11, 1971, an informant contacted the Spokane Police Department and requested assistance in obtaining her clothes from apartment No. 1, at South 164 State Street, in Spokane, Washington (R Mt. 11, R St. 20). The informant had lived in this apartment with one Robert Stigall, who apparently refused to give the informant her clothes (R St. 20). Two detectives accompanied the informant, and

while in apartment No. 1 observed portable video television equipment which the informant said was stolen (R Mt. 12, R St. 20, 60). The detectives copied the serial numbers of the equipment, returned to the police station, and determined that the items were stolen from the Liberty High School in Spokane County, Washington (R Mt. 12, R St. 31).

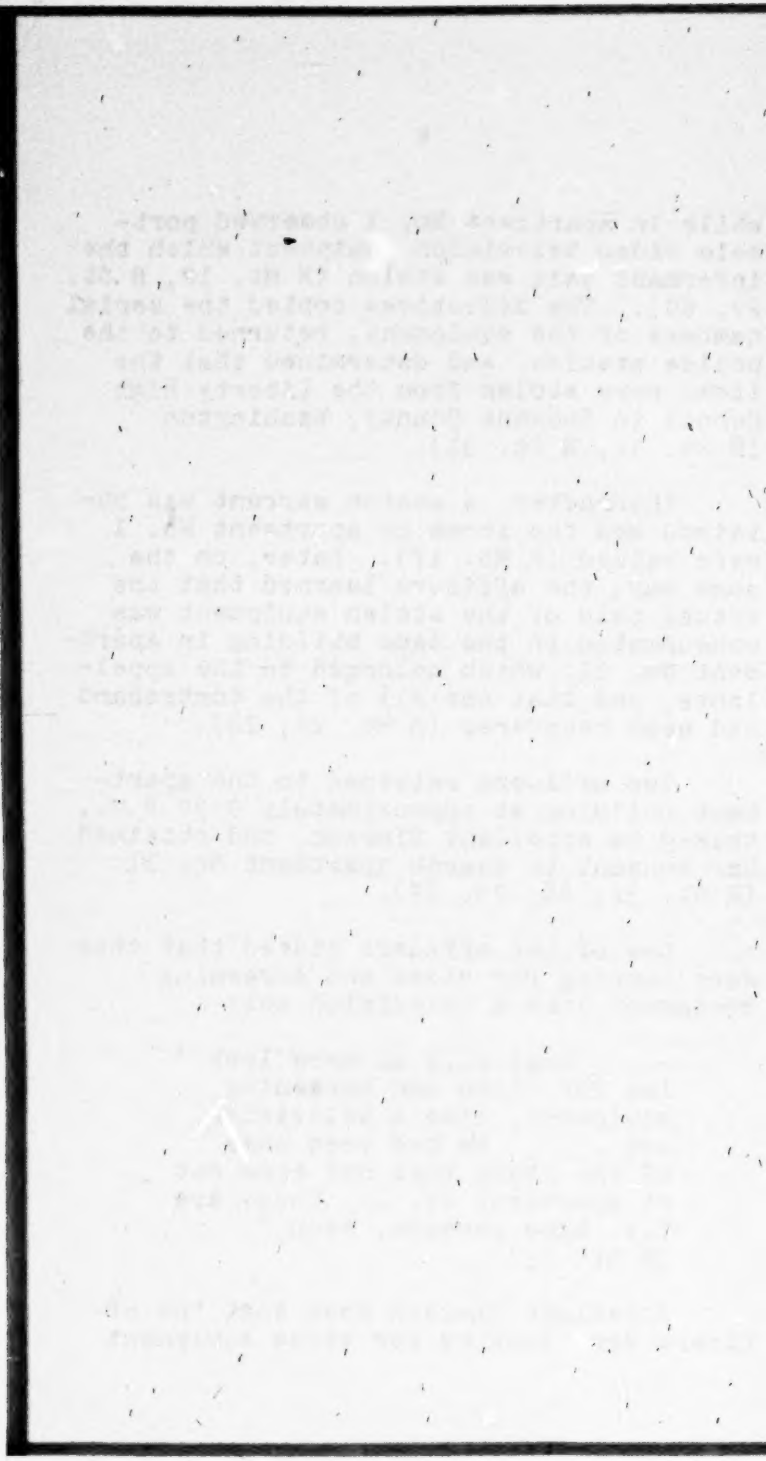
Thereafter, a search warrant was obtained and the items in apartment No. 1 were seized (R Mt. 17). Later, on the same day, the officers learned that the actual sale of the stolen equipment was consummated in the same building in apartment No. 11, which belonged to the appellants, and that not all of the contraband had been recovered (R Mt. 26, 28).

Two officers returned to the apartment building at approximately 9:30 P.M., talked to appellant Simpson, and obtained her consent to search apartment No. 11 (R Mt. 32, 48, 73, 87).

One of the officers stated that they were looking for video and screening equipment like a television set:

> "Basically we were looking for video and screening equipment, like a television set . . . We had seen some of the items that had come out of apartment No. 1. These are T.V. type screens, yeah." (R Mt. 93)

Appellant Simpson knew that the officers were looking for video equipment



(R Mt. 119, 138). The officers checked out the closet in which some of the items were reported to have been placed (R Mt. 36). They saw a portable Sony television set in the front room, which was sitting on a chair. They were not sure as to whether or not this T.V. was part of the stolen property (R Mt. 38, 76). As one of the officers stated:

> "Some of the items that had been recovered in apartment 1 looked like a television set. Not knowing entirely what was taken from the Liberty High School, I assumed that possibly this could have been --."
> (R Mt. 76)

In other words, one officer testified that the portable Sony television in question possibly could have been part of the contraband which they were looking for, in that they had previously found a closed-circuit television which resembled a portable television in all respects.

Further, another officer testified that the portable Sony television appeared "incongruent"; it just didn't fit in the setting. Taking all of the facts into consideration, it was an item that one "would normally find under the circumstances that could be stolen" (R Mt. 38). For these reasons, one of the officers copied the serial number just in case the portable Sony television could have been part of the stolen portable video equipment (R Mt. 38, 76, 94). The officer had to tilt the television set to see the

serial number (R Mt. 75, 91).

No property was seized, and after the search was completed the officers left. The serial number of the portable Sony television was radioed to the police station and was later identified as being stolen from the Sunset Pharmacy in Spokane, Washington (R Mt. 39, R St. 2, 3). At approximately midnight a search warrant was obtained and the television in question was seized about two hours later (R Mt. 40). As a result of the seizure of the portable Sony television, the appellants were charged with Grand Larceny by an Information filed on September 30, 1971. A pretrial motion to suppress the television was denied, and the appellants were convicted by a jury of Grand Larceny on January 28, 1972.

On May 15, 1973, Division III of the Washington Court of Appeals reversed the decision of the trial court, holding that the portable Sony television set was inadmissible because the "plain view" exception to searches without a warrant did not apply, where the police had no immediate knowledge that they had contraband before them as required by Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971).

The Supreme Court of Washington granted review to determine, in part, if, under the circumstances presented, there was a "seizure" in the first instance. In affirming the Court of Appeals, five members of the Supreme Court of Washington held that there was a "seizure" while four members disagreed.

REASONS FOR GRANTING THE WRIT

I. THERE WAS NO SEIZURE.

By its decision in this case, the plurality of the Supreme Court of Washington has held that the serial numbers of the television were "seized" when the officers looked at them. In other words, it was held that seeing is seizing.

It is respectfully submitted that this is an extremely important issue. The decision has the effect of unduly restricting the right of authorities to seek out evidence of crime, and constitutes a significant departure from prior law.

Petitioner contends that seeing is not seizing, for mere observation does not constitute a search or seizure. Harris v. U.S., 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968). State v. Roff, 70 Wn.2d 606, 424 P.2d 643 (1967). 68 Am.Jur.2d, Searches and Seizures, §23, p. 678.

Here, the officers were properly on the premises with appellants' consent to search for video equipment. The officers had a right to be in the position to view the serial numbers of the portable Sony television in question, because they had previously seen contraband taken from the other apartment which included a portable closed-circuit video television similar to a portable television in all respects. If the officers could properly inspect the portable Sony television in question to determine that it was not a portable closed-circuit television, then they had

a right to observe that which their ordinary senses enabled them to observe.

Petitioner further contends that copying the serial numbers was not a "seizure" by the very definition of that term. In 79 C.J.S., Searches and Seizures, §1, p. 776, the term "seizure" is defined as follows:

> "Seizure. A seizure contemplates a forcible dispossession of the owner, and it is not a voluntary surrender."

This definition first appeared in Hale v. Henkel, 201 U.S. 43, 50 L.Ed. 652, 666, 26 S.Ct. 370 (1906), and Weeks v. U.S., 232 U.S. 383, 58 L.Ed. 652, 657, 34 S.Ct. 341 (1914). That this definition is still employed by both Federal and State Courts, is seen by the great number of cases cited in the supplement to 79 C.J.S., Searches and Seizures, §1.

A recent Florida case has defined "seizure" as an "act of taking custody of evidence." State v. Ashby, (Fla.) 245 S.2d 225 (1971).

Under these definitions it cannot be said that merely looking at or inspecting an object, without "forcibly dispossessing the owner of it" or taking "custody" or control of it, amounts to a "seizure". In the present case, when the officers tipped the Sony television, and viewed the serial numbers, they did not "seize" the evidence; they did not forcibly dispossess the owner of the television, nor did they take custody

of it. The television remained on the premises until the officers actually took custody of it pursuant to a search warrant. Only then were the appellants "forcibly dispossessed" of the television. To hold otherwise would be the equivalent of stating that anything the officers touched or looked at would be a "seizure". However, such does not comport with the meaning of that term as it is commonly and legally understood.

There are many cases which hold that merely observing serial numbers located in awkward places does not constitute a search or seizure. In U.S. v. Gunn, 428 F.2d 1057 (5th Cir. 1970), it was held that it did not constitute a search or seizure where officers had to crawl underneath a vehicle to observe and copy the serial numbers of the tires. It was there said at p. 1060:

> "We dispose quickly of Gunn's search-and-seizure argument regarding the serial numbers of the tires. The inspection of tires on a motor vehicle, performed by police officers entitled to be on the property where the vehicle was located, which in no way damaged the tires or the vehicle and was limited to determining the serial numbers of the tires was not a search within the Fourth Amendment. Alternatively, if the inspection is deemed to have constituted a Fourth

> Amendment 'search,' a search warrant was not necessary because the inspection was reasonable and did not violate Gunn's right to be secure in her person, house, papers, or effects. United States v. Johnson, 5 Cir., 1969, 413 F.2d 1396, 1399-1400, pending decision en banc; United States v. Graham, 6 Cir., 1968, 391 F.2d 439; Cotton v. United States, 9 Cir., 1967, 371 F.2d 385."

In U.S. v. Catanzaro, 282 F.Supp. 68 (S.D.N.Y. 1968), a postal inspector accompanied defendant to his apartment to obtain items purchased with stolen credit cards. While in the apartment the inspector noticed a rifle on a wall rack. The inspector had previously learned that defendant had a rifle repaired with one of the credit cards. His suspicions aroused, he inspected the serial number on the rifle. In holding that there was no search or seizure it was said at p. 69:

> "The inspector and his companions were lawfully present in the defendant's apartment pursuant to the express invitation of the defendant. Discovery of the rifle required no search and no intrusion into defendant's privacy beyond that to which he had expressly consented. The inspector was not precluded from

> observing what was clearly and plainly to be seen. Having seen the rifle, the inspector properly scrutinized it more carefully, thereby confirming his suspicions that it was part of the fruit of the alleged crime. That he was required to examine it more closely to identify the serial number did not transform a mere observation into an unconstitutional search. '*** mere observation [does not] constitute a "search."...'"

Thus there is authority for the proposition that the conduct of the officers in the present case in inspecting the serial numbers of the television in question did not constitute a search or seizure.

United States v. Gray, 484 F.2d 352 (6th Cir. 1973), cert. den. ___U.S.___, 39 L.Ed.2d 110, ___S.Ct.___ (1974), cited by the majority opinion of the Supreme Court of Washington in this case, is distinguishable. There, officers, while looking for illegal liquor and liquor apparatus, removed two rifles from an upstairs closet, took them downstairs, questioned the defendant concerning them, and then copied the serial numbers. Thereafter, it was learned that the rifles were stolen and they were later seized with a warrant. The manual inspection and copying of the serial numbers was held to be a seizure. However, unlike the present case, the objects ultimately seized had no relation whatsoever

with the objects the officers were initially searching for. Also, there was more than a mere tipping of a television, for the officers had actual custody, dominion, and control over the rifles for a substantial period, questioned the defendant concerning them, and during this time forcibly dispossessed the defendant of the rifles. In the present case, the officers did not actually take possession of the Sony T.V., but merely tilted it.

Petitioner respectfully submits that there was no "seizure" in this case as that term is ordinarily understood and legally interpreted by this and other courts. That this is an important issue is seen by the fact that the intermediate Court of Appeals in this case requested additional briefs on this point, as did the court in U.S. v. Gray, supra. The Supreme Court of Washington granted Review on this point and resolved it with a 5-to-4 decision, which reflects the split of authority in the Federal Courts on this point. Therefore, this is an important issue which needs clarification by this Court.

II. IF THERE WAS A SEIZURE, THEN IT WAS REASONABLE.

Even assuming, as many Federal Courts have assumed arguendo, that looking at serial numbers does constitute a search and seizure, it is not unreasonable in these circumstances.

In U.S. v. Moody, 311 F.Supp. 756 (D.C.S.C. 1970), officers inspected serial

numbers on a trailer which was parked in a public street adjacent to the defendant's home. The officers were seeking to "confirm suspicions" concerning the trailer and copied the serial numbers of a refrigeration unit on the outside and the serial numbers on the rug rail inside. In denying a motion to suppress, it was held that viewing the numbers was not a search, and even assuming that it was, that it was not an unreasonable search. It was there said at pp. 759-760:

> "The search conducted was no unreasonable search. The Fourth Amendment prohibits only unreasonable searches and seizures, and there is no showing here that the action of the F.B.I. agents under the particular circumstances was unreasonable or in any way in violation of the United States Constitution. Weaver v. United States, (5th Cir.) 374 F.2d 878 (dictum). In United States v. Self (10th Cir.) 410 F.2d 984, a 1969 case, where the defendants, as here, were not under arrest, the court said: 'If the opening of the car door and observation of the steering post was a search, it was a reasonable search in the circumstances presented.' In Pasterchik v. United States (9th Cir.) 400 F.2d 696, a 1968 case, the court stated:

'As noted previously the agents also obtained the engine and serial number of the Thunderbird by raising the hood of the car and by opening the left front door.' Under similar circumstances, our court has previously held that: 'Even if the mere opening of the door to look at the number was a search, it was a reasonable one.' Cotton v. United States, 371 F.2d 385 (9th Cir. 1967). Furthermore, we wrote that 'when a policeman or a Federal agent having jurisdiction has reasonable cause to believe that a car has been stolen, or has any other legitimate reason to identify a car, he may open a door to check the serial number, or open the hood to check the motor number, and * * * he need not obtain a warrant before doing so in a case where the car is already otherwise lawfully available to him.' In Holt v. Simpson, (7th Cir.) 340 F.2d 853, the court stated: 'The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case * * * that criterion * * * depends upon * * * the total atmosphere of the case.'" (My Emphasis)

Thus, obtaining serial numbers from vehicles, even if it requires raising the hood or opening a door or going underneath the vehicle is not a search. Moreover, the officer need not have probable cause, but only "a legitimate reason" to identify, and he then may open a door or hood, without a warrant, and look at the serial number. Even if this is considered a search, it is reasonable.

In the present case, the officers did have a "legitimate reason" to look at the serial numbers on the portable Sony television; they were suspicious, otherwise why would they even look? They were there looking for stolen portable video television equipment. Inspecting the portable television in question was merely a logical and reasonable extension of their investigation, if only to verify that it was not the portable video equipment they were looking for.

As in the case where one is stopped for a traffic violation and the officer suspects the vehicle to be stolen, he has the right to check the serial numbers; and so too, when the officers in the present case, who are looking for stolen equipment, see something suspicious and similar to what they are looking for, they have the right to look at the serial numbers. Their suspicions aroused, they have a "legitimate reason" for doing so. If this is a search or seizure then it is respectfully submitted that it is a reasonable one.

Even assuming that the officers did not have such well-founded suspicion, and that they were in appellants' apartment

looking for stolen items totally foreign to television equipment, their conduct in inspecting the portable Sony television was still reasonable, and not the type of conduct prohibited by the Constitution. Obviously, the Constitution prohibits the general rummaging or exploratory search of one's belongings. But in this case there was no real disturbance of another's effects. The disturbance, if any, in inspecting the television was so minimal as not to disturb one's right to privacy which the Constitution was meant to protect. On many occasions, this Court has said that it will give due credit to the experience of a police officer to ferret out crimes which a private citizen might not recognize. If one gives such credence to a policeman's experienced curiosity, then the totality of the circumstances presented by this case does not establish the type of unlawful intrusion which the Constitution meant to prohibit.

In attempting to strike a balance, the Courts have held that the intrusion was minimal, and the search and seizure reasonable, when officers obtain a serial number from a vehicle license plate, or by opening a vehicle door to inspect the number on the door post, or by raising the hood to get the engine number, or by going underneath the vehicle to get the tire numbers. In the cases at the opposite extreme, the Courts hold that there is an unreasonable search and seizure where the officers actually take custody and exercise dominion and control over the item. However, the totality of the circumstances in the instant case presents a middle ground where

the intrusion is de minimus and the officer's conduct was reasonable.

The conduct of the officers in the instant case can be categorized as "an intermediate response." In State v. Proctor, 12 Wn.App. 277 (1974), decided by Washington's intermediate Appellate Court one month after the instant case, it was held that the copying of serial numbers under similar circumstances was such an intermediate response. There, an officer, responding to an alarm in appellant's office, saw calculators and other equipment. He copied the serial numbers because he had previously been informed that appellant dealt in stolen property and the items looked incongruous. In rejecting the contention that copying the serial numbers constituted a seizure, it was said at p. 277:

> ". . . It was reasonable for him to note the serial numbers. State v. Palmer, 5 Wn.App. 405, 487 P.2d 627 (1971). Moreover, in police work, circumstances sometimes develop in which an intermediate response is appropriate. If a police officer has a 'well-founded suspicion not amounting to probable cause' that a person has, is, or is about to commit a crime, that person may be detained for investigatory purposes without an arrest. Adams v. Williams, 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972); State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974). The

> temporary detention may continue while the officer questions other persons present or radios police headquarters to check the information gained. State v. Sinclair, 11 Wn. App. 523, 523 P.2d 1209 (1974); State v. Kerens, 9 Wn.App. 449, 513 P.2d 63 (1973). See also United States v. Van Leeuwen, 397 U.S. 249, 25 L.Ed.2d 282, 90 S.Ct. 1029 (1970); United States v. Soriano, 482 F.2d 469 (5th Cir. 1973); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973); United States v. Catanzaro, 282 F. Supp. 68 (S.D.N.Y. 1968). A noting of the serial numbers on the calculators was such an intermediate response."

It is respectfully submitted that the present case is not distinguishable. In both cases, the officers had prior information that the appellants dealt in stolen property. In both cases, the items inspected looked incongruous. Moreover, in the present case the portable Sony T.V. was similar to the video equipment they were originally looking for. Under these circumstances, noting the serial numbers was merely an intermediate response.

Petitioner respectfully contends that the issue in this respect is one of great public import, and is in need of prompt determination by this tribunal. The conflict in the Federal and State Courts is apparent.

This Court has recently recognized that once consent to search has been obtained, "the circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning", and consequently the "police may seek to investigate further suspicious circumstances". Schneckloth v. Bustamonte, 412 U.S. 218, 231, 36 L.Ed.2d 854, 865, 93 S.Ct. 2041 (1973). Petitioner respectfully urges that the instant case presents just such a situation. For this reason, review by this Court should be granted.

CONCLUSION

Petitioner prays that this Court grant review, reverse the decision of the Supreme Court of Washington in this case, and reinstate appellants' convictions for Grand Larceny.

Respectfully submitted,

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APPENDIX "A"

[No. 42897. En Banc. November 7, 1974.]

THE STATE OF WASHINGTON, *Petitioner*, v. JOHN MURRAY *et al.*, *Respondents*.

[1] **Searches and Seizures—Objects in Plain View—Immediate Recognition—Necessity.** An officer may seize an object under the plain view doctrine only when he immediately recognizes that the object is evidence or contraband.

[2] **Searches and Seizures—What Constitutes—Copying of Serial Number.** The act of examining an object and copying its serial number is a seizure.

WRIGHT, J., HALE, C.J., and FINLEY and HAMILTON, JJ., dissent by separate opinion.

Review of a decision of the Court of Appeals, May 15, 1973, 8 Wn. App. 944. *Affirmed.*

The Court of Appeals reversed a judgment of the Superior Court for Spokane County, No. 20252, John J. Lally, J., entered March 6, 1972. The respondent (State) petitioned the Supreme Court for review.

Prosecution for larceny. The defendants appealed to the Court of Appeals from convictions and sentences.

Donald C. Brockett, Prosecuting Attorney, and *Fred J. Caruso, Deputy,* for petitioner.

R. Max Etter, Sr., for respondents.

HUNTER, J.—The defendants (respondents), John Murray and Linda Simpson, were convicted of grand larceny by knowingly possessing a stolen Sony television set, following a jury verdict of guilty. The Court of Appeals, Division Three, reversed the judgment of the trial court, and dismissed the information on the grounds of an illegal search and seizure. The petitioner, State of Washington, filed a petition for review with this court, which we granted.

The facts, as shown by the record, are as follows. On August 11, 1971, members of the Spokane police department arrived at an apartment house in Spokane, Washington, to assist an informant in obtaining clothing which she had left in apartment No. 1. While in the apartment the

officers observed video television equipment and learned from the informant that these items were stolen. The police later discovered that the items in apartment No. 1 were stolen from the Liberty High School. The informant also indicated that she thought there was some more equipment in apartment No. 11 of the same building.

Pursuant to a search warrant, the items in apartment No. 1 were seized. During the course of this search Sergeant McGougan noticed a letter from the informant addressed to a known prostitute, stating that Linda Simpson was living with the defendant Murray in apartment No. 11. Thinking that the defendant Simpson would know the whereabouts of one Robert Stigall, who the police wanted for burglary of the items seized in apartment No. 1, he and another officer set out in a patrol car to see if they could locate her.

Shortly thereafter, the police observed a vehicle in which the defendant Simpson was riding and stopped it. According to the testimony of the police officers, the defendant Simpson was requested to get into the back seat of the car, but was not ordered to do so. The officers further stated that the conversation was not intimidating or coercive; rather, the officers stated that they were merely counseling her, and admitted asking questions about the defendant's child and explained that they had a genuine concern about the child's well-being.

Later in the evening, about 9:30 p.m., the officers returned to the apartment building and found the defendant Simpson sitting on the front porch. They asked her to come to the car and sit in the back seat. Sergeant McGougan then requested to search her apartment, but she refused. After more conversation, Sergeant McGougan informed the defendant Simpson that they could obtain a search warrant even if she didn't consent, and that they would leave an officer there to make certain none of the property was taken from the premises during the time they were away acquiring the search warrant. The defendant Simpson stated that the policeman told her that she should be will-

ing to let them search the apartment if she had nothing to hide, but she said that, although she was unfamiliar with the law, she didn't believe they could search the apartment without a warrant. The police advised her that this was true but that they could easily obtain a warrant.

It was about this time that John Weimerskirch, a friend of the defendant Simpson, arrived on the scene, and he was also questioned by the police. Thereafter, the officers again asked for permission to search apartment No. 11, and the defendant Simpson asked what they were looking for. They told her that they were looking for office and video equipment, such as typewriters, calculators, etc. Thereafter, the defendant Simpson told them that they could search the premises and look for the items mentioned.

In searching the apartment the officers made an extensive search of the premises, opening closets, examining equipment which the defendant owned and, although disputed by the officers, Simpson stated that they looked in the refrigerator. On the way out of the premises, Sergeant McGougan asked Detective Tiegan to get the serial number off the portable television set which was resting on a chair. He tipped it and wrote down the serial number. The officers then left. Shortly thereafter, the officers checked the serial number on the television set, and determined that it had been stolen, not from Liberty High School but from the Sunset Pharmacy in Spokane, Washington. A search warrant was later procured around midnight, and the police officers returned to apartment No. 11 approximately 2 hours later and seized the television set pursuant to the search warrant.

As a result of the seizure of the Sony television set, the defendants were charged with grand larceny by information filed on September 30, 1971. A pre-trial suppression hearing was held, and the evidence was thereafter held admissible at trial where the defendants were convicted after a jury verdict of guilty. The defendants appealed.

The Court of Appeals, Division Three, reversed the judg-

ment and sentence by the trial court, and affirmed the trial court's finding that the defendant's consent to the search of the apartment was voluntary, but ruled that the Sony television set was inadmissible for the reason that the "plain view" exception to searches conducted without a warrant did not apply to the facts of this case. The petitioner thereafter filed a petition for review with this court, which we granted.

As a background for determining the key issue in the petition for review, we must first consider the testimony of the police officers in this case. The record shows some inconsistent statements by Detective Tiegan as to what the police officers were looking for when they searched apartment No. 11, but there is no dispute in the record as to what items the officers told Linda Simpson they were looking for, i.e., office and video equipment, such as typewriters, calculators, etc., and that the consent for the search was granted upon that representation. It is admitted that the officers did not find the equipment they were looking for and the court so found. This is implicitly demonstrated by the following colloquy at the pre-trial suppression hearing during Detective Tiegan's testimony on direct examination:

> Q. Did you know what you were looking for when you entered the apartment? Did you have a definite idea of what might be in there? A. I had an idea of some of the items, but not all of them. Q. What items did you think might be in there? A. Calculators. THE COURT: As I understand it, he didn't find any items in there he was looking for. MR. ETTER: That is right. THE COURT: The question before me is solely this, first was there consent, second assuming there was consent may they subsequently seize the Sony. MR. ETTER: That is it. THE COURT: So I don't care about this other stuff.

The court, in its memorandum decision in the suppression hearing, also implicitly found that the officers were looking only for adding machines, calculators and video

equipment, and expressly determined that none of these items was found. The court stated:

> Finally, she asked them what they were looking for, to which they said they were looking for adding machines, calculators and video equipment. . . .
>
> . . .
>
> In any event, the officers in the apartment did not find any fruits of the burglary of Liberty High School . . .

The admission of the officers that they were not looking for the Sony television set is as follows. Sergeant McGougan, at the suppression hearing, stated:

> Q. You said something about office equipment and typewriter. A. And video, yes. Q. And video— A. Equipment. Q. And at that time when you came in, you weren't looking for any stolen Sony TV, were you? A. No way.

Detective Tiegan, at the suppression hearing, testified as follows:

> Q. The things that you told Mrs. Simpson that you wanted to search for, there were none of them in the apartment, isn't that true? A. It's true. I didn't ask her.

Detective Tiegan, at the trial on the merits, further testified:

> Q. When you first went to Apartment 11, did you know what you were looking for? A. We had an idea, yes. Q. *Did that include a Sony TV set*? A. *No*. Q. What did you have in mind when you got the consent? A. Sgt. McGougan told me other items had been taken in the high school burglary which had not been recovered; assuming I had seen some of the items in Apartment 1 which consisted of a camera and a little Sony TV set and several tapes, there was supposed to be some calculators and typewriters.

(Italics ours.)

The judge at the suppression hearing, however, held that the plain view doctrine applied to the following facts:

> [T]hey did see a television set reposing on a chair in the bedroom. To one officer this seemed somewhat incongruous. Knowing that some such sets are stolen, the officer went to the chair *without permission* or objection

of the defendant, tilted the set in order to get the number therefrom and then left the apartment without the set.

(Italics ours.)

The suppression hearing judge, in his memorandum opinion, further stated:

> *After several questionings as to what the officers were looking for, she gave them consent to enter her apartment.* The court must find that this was voluntarily done, without coercion and duress, *she believing at that time that they were looking only for the machines from the Liberty High School burglary, and the court is of the opinion that she knew such equipment was not in her apartment and that is the key to the reason why she gave consent.* That is the explanation for her actions.
>
> A critical question is whether or not the television set, *which was found not as a result of the search for which consent was given,* but which accidentally appeared, should be suppressed; whether or not it is admissible under the "plain view doctrine."

(Italics ours.)

The issue then before this court is whether the plain view doctrine can be applied under the facts of this case where the Sony television set, which was tilted, and from which the serial numbers were taken, was not seized as a result of the search for which the consent was given. The judge at the suppression hearing held that the plain view doctrine did apply and the trial judge at the trial on the merits adopted the reasoning of the suppression hearing judge, also holding that the plain view doctrine applied.

[1] The plain view doctrine was extensively discussed and reenunciated by the United States Supreme Court in the recent case of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). The quotations from that decision by our Court of Appeals in the instant case (*State v. Murray*, 8 Wn. App. 944, 948, 509 P.2d 1003 (1973)), are most pertinent:

> The plain-view doctrine is firmly embedded in our law, and the guidelines for its application were explained exhaustively in *Coolidge v. New Hampshire*, 403 U.S.

443, 454, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). The Supreme Court said, at page 454:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be a "showing by those who seek exemption . . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

(Footnotes omitted.) The court continued, at page 466:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. *Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.*

The Court of Appeals, in *State v. Dimmer*, 7 Wn. App. 31, 33, 497 P.2d 613 (1972), correctly analyzes *Coolidge v. New Hampshire*, *supra*, and the application of the plain view doctrine as follows:

> In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) it was held that objects in plain view found inadvertently by police officers while searching under a valid warrant may be seized if it becomes immediately apparent to the police that they have evidence before them. This "plain view" doctrine is an exception to the strict rule announced in *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 72 L. Ed. 231

(1927). The Supreme Court held, in 275 U.S. 192, 196, that:

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

The court, in *Coolidge*, has now carved out a common sense "plain view" exception to this rule with limiting safeguard requirements added to assure that a proper limited search does not become an unconstitutional general exploratory search. These safeguard requirements needed to justify a "plain view" seizure include: *a prior justification for intrusion, an inadvertent discovery of incriminating evidence, and immediate knowledge by police that they have evidence before them.*

(Italics ours.)

In the instant case the initial intrusion by the officers was justified since they had obtained the consent of the defendant Simpson to search apartment No. 11. However, the search under this record was limited to items that had been stolen from the Liberty High School. The Sony television was not one of these items and it was not subject to seizure under the plain view doctrine since the officers did not have immediate apparent knowledge that they had incriminating evidence before them. *Coolidge v. New Hampshire, supra.*

Under these facts, the police did not know the television set was incriminating until after the serial numbers had been checked with police headquarters. In this regard, the petitioner contends that the television set was incongruous and the exigencies of the circumstances caused the officers to suspect that it had been stolen. We agree with the Court of Appeals, however, that there was nothing unusual about the location of this set as to its utility and usability in the defendant's premises. To say it looked incongruous because, as stated by Detective Tiegan, he thought the television set was more than likely stolen since the defendant was appar-

ently unemployed at the time and could probably not afford a television set, would be pure speculation.

We, therefore, hold that the trial court erred in allowing the seizure of the television set under the plain view doctrine since the officers did not possess the requisite immediate knowledge upon which they could reasonably conclude that they had incriminating evidence before them. *Coolidge v. New Hampshire, supra.*

[2] The petitioner further argues that the taking of the serial numbers was not a seizure. The facts cannot support this conclusion. The serial numbers were not within the plain view of the officers, and their being obtained by the tilting of the Sony television constituted a warrantless seizure of those numbers.

United States v. Gray, 484 F.2d 352 (6th Cir. 1973), supports our holding that the taking of the serial numbers constituted a seizure. In that case Kentucky law enforcement officers had reliable information that the operator of a grocery store was selling beer without a license. The officers properly obtained a search warrant which directed the seizure of "any intoxicating liquors, apparatus for manufacturing intoxicating liquors or materials used in the manufacture of intoxicating liquors." In searching the store premises for the specific items described in the warrant, one of the officers noticed two rifles leaning against a wall in an upstairs closet, and removed the rifles from the closet and took them to the store area where he copied down the serial numbers of the weapons. The serial numbers were later checked, and it was discovered that the firearms had been stolen. A second search warrant was later procured upon which the officers returned and seized the two rifles. After holding that the seizure of the rifles was not justified under the plain view doctrine, the United States Court of Appeals of the 6th Circuit stated as follows on page 356:

> The government argues that Trooper Brodt's actions were not a search or a seizure. Whether or not the officer's actions constituted a technical search, they clearly were a seizure. Officer Brodt, to be sure, could not

help noticing the rifles in the closet as he had every right to do. But he did not simply see or observe the presence of the rifles (which as we have indicated were not contraband nor recognized by the officer to be such). Instead he removed them from the closet, carried them to the lower floor of the building and then copied down the serial numbers. The fact that he did not take the rifles with him after conducting the search does not make his actions any less a seizure. *Removing the rifles from the closet was a seizure as was the copying down of the serial numbers. See* United States v. Sokolow, 450 F.2d 324 (5th Cir. 1971).

(Footnote omitted. Italics ours.)

The petitioner further argues that Detective Tiegan stated that he was looking for any television screens, and that he suspicioned the Sony television could have been an item stolen from the Liberty High School since one of the items stolen in apartment No. 1 looked like a television set. This rationalization to justify the seizure is untenable in view of his admission at the trial that the Sony television was not one of the items they were looking for, and in view of the factual determination by the suppression hearing judge that the Sony television was not included in any of the items stolen from the Liberty High School for which they were searching.

The determination of the Court of Appeals is affirmed and the trial court is reversed.

ROSELLINI, STAFFORD, UTTER, and BRACHTENBACH, JJ., concur.

WRIGHT, J. (dissenting)—I dissent. The recitation of the facts by the majority is accurate and I adopt such facts.

I would reverse the Court of Appeals for two reasons, either of which would adequately justify such a reversal and the reinstatement of the judgment of the trial court. The reasons are (1) a television set is video equipment, and as such is within the consent given to search the apartment, (2) the act of slightly tipping a television set sitting on a chair and copying the serial number therefrom is not a

constitutionally impermissible act under the facts and circumstances here present.

Consent was given to search for video and office equipment. The definition of "video" as found in *Webster's Third New International Dictionary* (1968), whether as an adjective or as a noun is equivalent to "television," and reads as follows: "relating to or used in the transmission or reception of the television image." A consent to search for video equipment would include the consent to search for television sets. A search can be by consent. *State v. Greco*, 52 Wn.2d 265, 324 P.2d 1086 (1958); *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973).

The burden of proof is upon the State to establish that consent was freely given without coercion. The trial court found that the consent was voluntary. The Court of Appeals affirmed that finding. *State v. Murray*, 8 Wn. App. 944, 509 P.2d 1003 (1973).

In a number of recent cases it has been held the observing and checking of serial numbers even if in places which are difficult to observe is not a search. One of the cases most similar to the present case is *United States v. Gunn*, 428 F.2d 1057 (5th Cir. 1970), in which it was held the copying of serial numbers of tires was not a search. In that case the officer had to crawl under the vehicle to read the numbers. Therein the court said in part at page 1060:

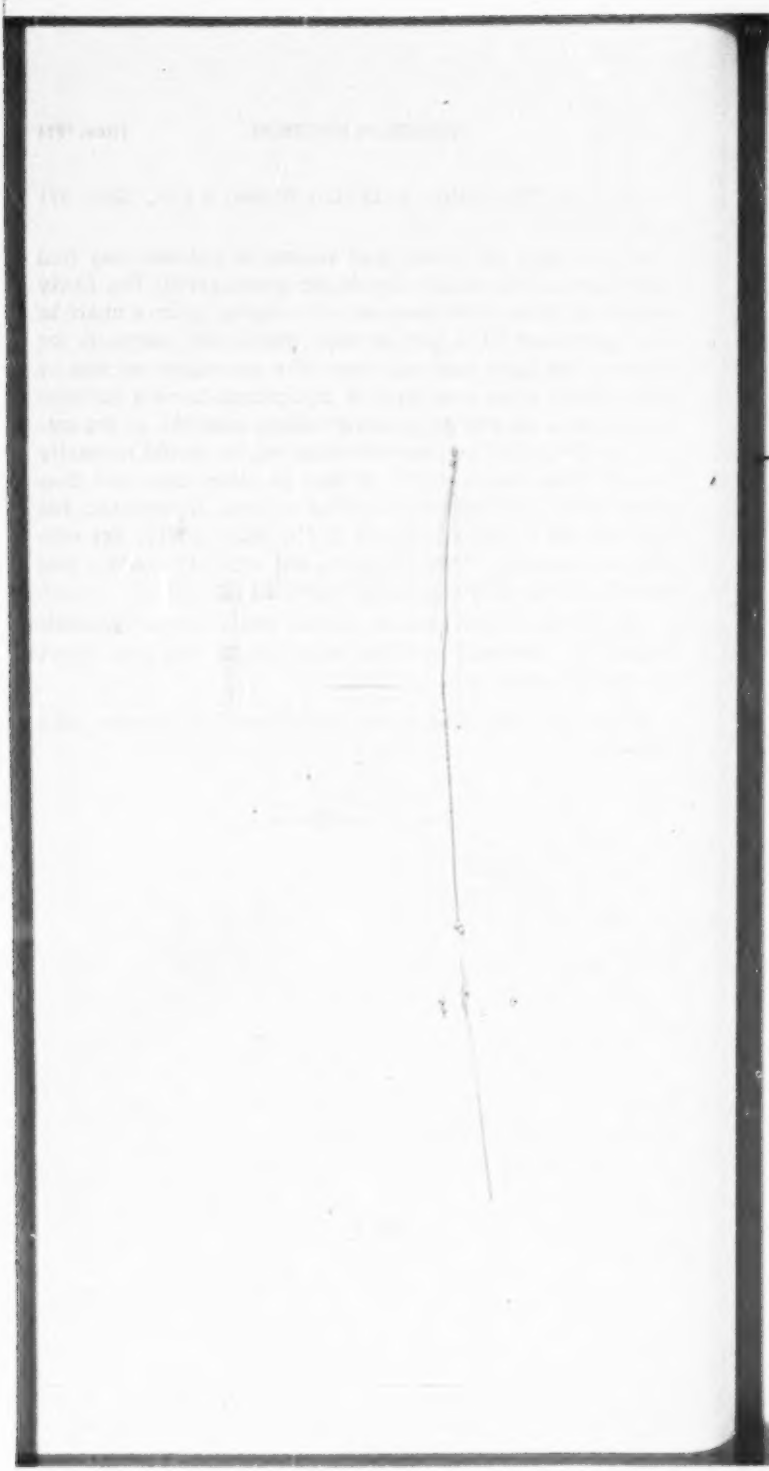
> We dispose quickly of Gunn's search-and-seizure argument regarding the serial numbers of the tires. The inspection of tires on a motor vehicle, performed by police officers entitled to be on the property where the vehicle was located, which in no way damaged the tires or the vehicle and was limited to determining the serial numbers of the tires was not a search within the Fourth Amendment. Alternatively, if the inspection is deemed to have constituted a Fourth Amendment "search," a search warrant was not necessary because the inspection was reasonable and did not violate Gunn's right to be secure in her person, house, papers, or effects. United States v. Johnson, 5 Cir., 1969, 413 F.2d 1396, 1399-1400, pending decision en banc; United States v. Graham, 6 Cir., 1968,

391 F.2d 439; Cotton v. United States, 9 Cir., 1967, 371 F.2d 385.

In this case the police had reason to believe they had found something which should be investigated. The fairly expensive color television set was sitting upon a chair in the apartment of a person who would not normally be expected to have such an item. The television set was of the general kind and type of equipment known to have been stolen. As one experienced officer testified, in the setting in which he saw the television set, he would normally expect it had been stolen. It was in plain view and thus came within the rule of *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). *See also State v. Dimmer*, 7 Wn. App. 31, 497 P.2d 613 (1972); and *State v. Porter*, 5 Wn. App. 460, 488 P.2d 773 (1971).

For either of the reasons stated, the Court of Appeals should be reversed and the judgment of the trial court should be reinstated.

HALE, C.J., and FINLEY and HAMILTON, JJ., concur with WRIGHT, J.



APPENDIX "B"

[No. 600-3. Division Three. May 15, 1973.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN MURRAY *et al.*, *Appellants*.

[1] **Searches and Seizures—Consent—Voluntariness—Burden of Proof.** The state has the burden to show that consent to a search was freely and voluntarily given.

[2] **Searches and Seizures — Consent — Voluntariness — Determination.** Whether the consent given to a search was voluntary is a question of fact.

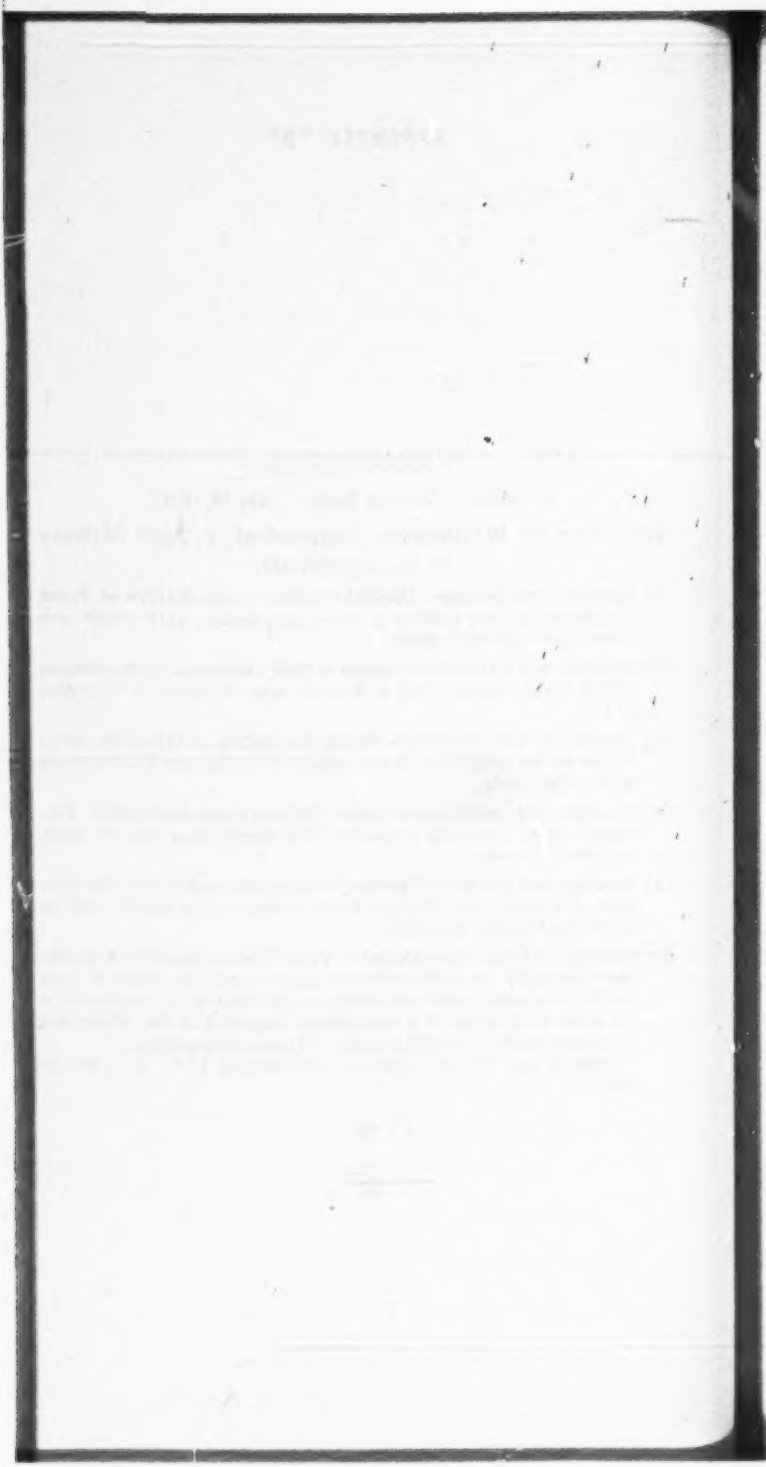
[3] **Appeal and Error—Review—Scope—Credibility of Witnesses.** Evaluation of the credibility of witnesses is a matter for the discretion of the trial court.

[4] **Searches and Seizures—Consent—Voluntariness—Persuasion.** Persuasion used to obtain a consent to a search does not, in itself, constitute coercion.

[5] **Searches and Seizures—Consent—Voluntariness—Review.** The findings of a trial court relating to the validity of a search will be given great weight on appeal.

[6] **Searches and Seizures—Objects in Plain View—Immediate Recognition—Necessity.** A police officer on private property under a prior justification cannot seize an object on the basis of its being within his plain view unless it is immediately apparent to the officer that the object constitutes contraband or incriminating evidence.

[See 68 Am. Jur. 2d, Searches and Seizures § 88; 29 L. Ed. 2d 1067.]



Appeal from a judgment of the Superior Court for Spokane County, No. 20252, John J. Lally, J., entered March 6, 1972. *Reversed.*

Prosecution for larceny. The defendant appeals from a conviction and sentence.

R. Max Etter, Sr., for appellants.

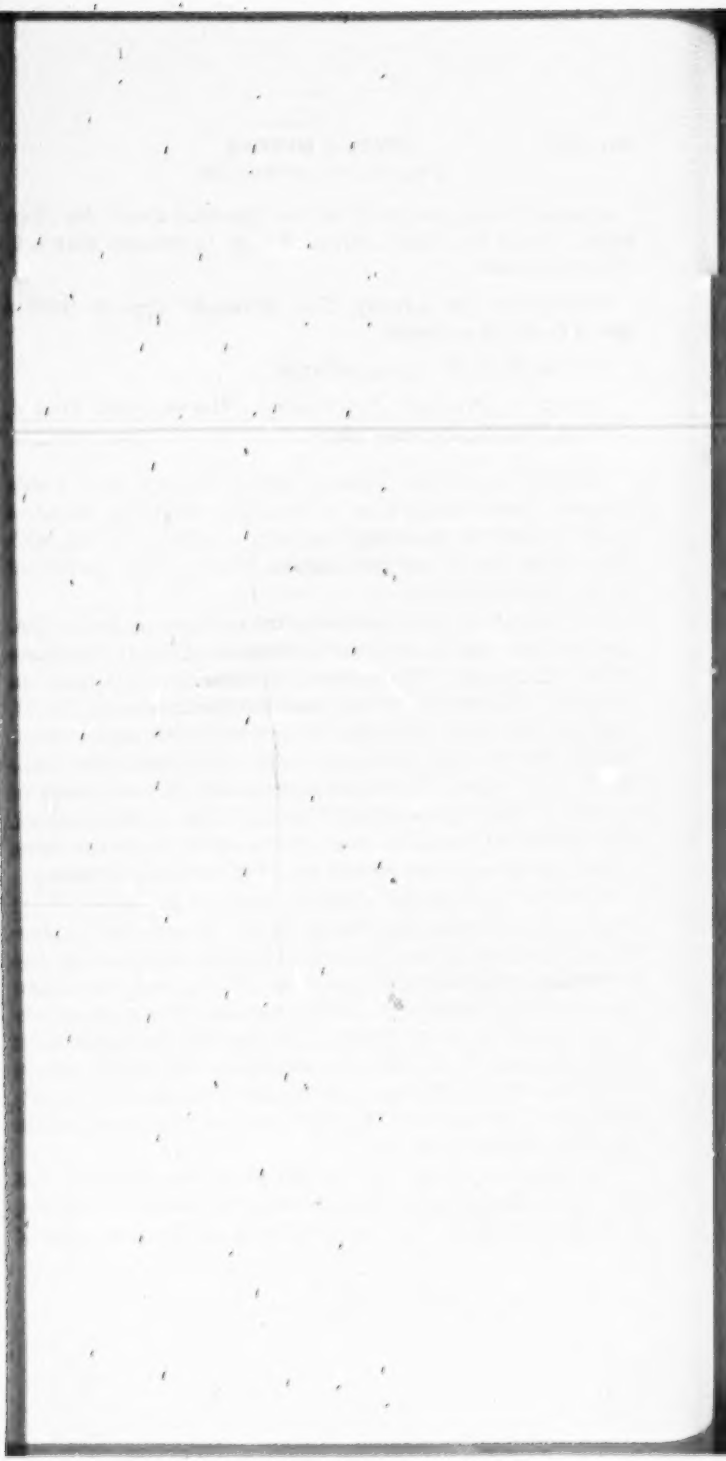
Donald C. Brockett, Prosecuting Attorney, and *Fred J. Caruso, Deputy*, for respondent.

McINTURFF, J.—Defendants John Murray and Linda Simpson were charged by information with the crime of grand larceny by knowingly possessing a Sony TV set, with knowledge that it had been stolen. From a jury verdict of guilty, defendants appeal.

On August 11, 1971 members of the Spokane Police Department arrived at an apartment house at South 164 State Street in Spokane, Washington, to assist an informant in obtaining clothes which she had left in apartment No. 1. While in the apartment the officers observed video television equipment and learned from the informant that these items were stolen. The police determined that the items in apartment No. 1 were stolen from the Liberty High School. The informant indicated that she thought there was some more equipment in apartment No. 11 of the same building.

Pursuant to the search warrant, items in apartment No. 1 were seized. During the course of this search Sgt. G. McGougan noticed a letter from defendant Simpson to the informant, mentioning Simpson was living with defendant Murray in apartment No. 11. The detective knew the writer of the letter to be a prostitute. Thinking that defendant Simpson would know the whereabouts of one Stigall, whom the police wanted for burglary of the items seized in apartment No. 1, he and another officer set out in a prowl car to see if they could locate her.

The police observed the car Simpson was riding in and stopped it. According to the testimony of the police officers, defendant Simpson was not ordered into the back seat of



the car but was merely requested to do so. The officers further stated that the conversation was not intimidating or coercive; rather, the officers were merely counseling her but admitted asking questions about the defendant's child and explained that they had a genuine concern about the child's well-being.

Later in the evening, about 9:30, the officers returned to the apartment building and found defendant Simpson sitting on the front porch. They asked her to come to the car and sit in the back seat. Sgt. G. McGougan then requested to search her apartment but she refused.

After more conversation Sgt. G. McGougan informed defendant Simpson that they could obtain a search warrant even if she didn't consent, and that they would leave an officer there to make certain none of the property was taken from the premises during the time they were away acquiring the search warrant. Defendant Simpson further stated that the policeman told her that she should be willing to let them search the apartment if she had nothing to hide, but she said that, although she was unfamiliar with the law, she didn't believe they could search the apartment without a warrant. The police advised her that this was true but that they could easily obtain a warrant. However, it was explained at trial the police didn't want to get a search warrant because they were afraid they would have to disclose the name of their informant.

It was about this time that John Wimerskirch, a friend of Simpson, arrived on the scene and he was also questioned by the police. Thereafter the officers again asked for permission to search and defendant Simpson asked what they were looking for. They told her they were looking for office and video equipment, such as typewriters, calculators, etc. Thereafter, defendant Simpson told them they could search the premises and look for the items mentioned.

In searching the apartment the officers made an extensive search of the premises, opening closets, examining equipment defendant Simpson owned and, although disputed by the officers, Simpson stated that they looked in

the refrigerator. However, on the way out of the premises Sgt. G. McGougan asked Detective Tiegen to get the serial number off the portable TV set which was resting on a chair. He tipped it and wrote down the serial number. The officers then left. They checked the serial number on the TV set, determined it had been stolen, not from Liberty High School but from the Sunset Pharmacy, procured a search warrant, returned, and seized the television set.

The first assignment of error contends that the court erred in refusing to grant the defendant's motion to suppress the evidence because the consent was not freely and voluntarily given and was therefore violative of the defendant's rights under the fourth and fifth amendments to the United States Constitution.[1]

[1] The burden of proof is on the state to show that the consent to search was freely and voluntarily given. *McNear v. Rhay*, 65 Wn.2d 530, 398 P.2d 732 (1965); *State v. Breckenridge*, 4 Wn. App. 328, 481 P.2d 26 (1971); *Bumper v. North Carolina*, 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (1968).

Defendants contend there is evidence which indicated the officers were indirectly threatening the defendant; that the court would possibly deprive her of her child's custody. Sgt. G. McGougan stated that he was interested in the child and was concerned about the child's environment. Sgt. G.

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[1] "Amendment IV. Security From Unwarrantable Search And Seizure. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Amendment V. Rights Of Accused In Criminal Proceedings. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

McGougan is in juvenile work and was sincerely interested in the welfare of the child. Defendants, however, further contend the conversations took place in the police car rather than on the sidewalk or at defendant Simpson's apartment; that because of these facts and other facts in the record the defendant was coerced into finally agreeing to consent.

[2, 3] Whether or not the consent was voluntary is a factual question. *State v. Smith*, 72 Wn.2d 479, 434 P.2d 5 (1967). It is the function of the trial court to evaluate the credibility of the witnesses. *State v. Breckenridge, supra.*

[4, 5] The trial court found that defendant was not coerced in consenting to allow the search. Mere persuasion does not constitute coercion. *State v. Lyons*, 76 Wn.2d 343, 458 P.2d 30 (1969). The trial court's finding must be given great weight by this court and we find that the finding was amply supported by the evidence.

[6] Finding the police had consent to be in the premises of the defendant, was the Sony TV admissible under the "plain view" exception to searches conducted without a warrant?

The plain-view doctrine is firmly embedded in our law, and the guidelines for its application were explained exhaustively in *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). The Supreme Court said, at page 454:

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be a "showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it."

(Footnotes omitted.) The court continued, at page 466:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification

for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. *Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.*

(Italics ours.)

In *State v. Dimmer*, 7 Wn. App. 31, 497 P.2d 613 (1972) this court clearly stated the prerequisites for invoking the "plain view" doctrine. They are (1) prior justification for an intrusion; (2) an inadvertent discovery of incriminating evidence; and (3) *immediate knowledge* by the police that they had evidence before them.

In the instant case defendant Simpson consented to the search of her premises for specific kinds of articles, i.e., office equipment, including typewriters and calculators, and video equipment. Therefore, there was a justification for being on the premises.

QUERY: Did the officers have immediate apparent knowledge that they had incriminating evidence before them?

In *State v. Palmer*, 5 Wn. App. 405, 487 P.2d 627 (1971), it was held that it was permissible under the "plain view" doctrine for an officer to seize a paper bag which had "challenged his attention" even though the contents were concealed. There were many surrounding circumstances upon which the court concluded the officers had immediate knowledge that incriminating evidence (the paper bag) was before them.

In *State v. Porter*, 5 Wn. App. 460, 488 P.2d 773 (1971), LSD capsules were in plain view and were admitted. In *United States v. Wheeler*, 459 F.2d 1228 (D.C. Cir. 1972) the arresting officer, after impounding the car, noticed a brown envelope in an ashtray. Drawing upon his experi-

ence he "suspected" that it contained narcotics. The evidence was held admissible.

In *Presley v. State*, 284 N.E.2d 526 (Ind. Ct. App. 1972), there was a seizure of a stolen camera without a search warrant in defendant's home at the time of his arrest. The same camera had been reported stolen; therefore, the officer had immediate knowledge incriminating evidence was before him.

In the instant case Sgt. G. McGougan testified in part as follows:

Q What were you looking for?
A The remaining Sony equipment and typewriters taken from the school.
Q In particular, were you looking for a Sony color set?
A No.
. . .
Q [At] the time you got the TV you don't have any independent recollection of having talked with Donna Reedy about that particular TV?
A No. I had no conversation with anyone about that set that evening until Detective Tiegen submitted the number to N.C.I.C.
. . .
Q At any rate, as I understand it, at the time you went into the apartment, what you were looking for were items mostly of office equipment type, at least from what Officer Peoples said, calculators and the like?
A It was my understanding in addition to those items, there was still *TV equipment* missing.
Q Monitoring equipment?
A I don't know.
Q But not this TV?
A If I was given information there was a Sony color TV I would suppose that was *not part of the equipment* but I didn't know it was a color TV; I knew it was Sony.

(Italics ours.)

Detective Tiegen, who was with Sgt. McGougan and who wrote down the serial numbers of the TV, testified in part as follows:

Q *When you first went to Apartment 11, did you know what you were looking for?*

A *We had an idea, yes.*

Q *Did that include a Sony TV set?*

A *No.*

Q What did you have in mind when you got the consent?

A Sgt. McGougan told me other items had been taken in the high school burglary which had not been recovered; *assuming* I had seen some of the items in Apartment 1 which consisted of a camera and a little Sony TV set and several tapes, there was supposed to be some calculators and typewriters.

(Italics ours.)

Detective Tiegen, on cross-examination, testified:

Q Did she [Donna Reedy] tell you at that time there was another color TV besides the one you were talking about in the apartment [Apartment No. 1] at the same time?

A *No, I didn't know about another set.*

(Italics ours.) Sgt. G. McGougan, on cross-examination, had testified:

Q And at that time you came in, you weren't looking for any stolen Sony TV, were you?

A *No way.*

(Italics ours.)

Seizable items which inadvertently come into view of officers who are lawfully searching or who otherwise have a right to be where they are may be retained and used in the prosecution of the crime. *See Harris v. United States*, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968). This statement of the plain-view rule, however, is limited to evidence discovered inadvertently unless contraband, stolen or dangerous objects, and when exigent circumstances exist. The plain view of objects inside a house, even if the police have probable cause, will not, without exigent circumstances, authorize their seizure without a warrant. *See Coolidge v. New Hampshire, supra.*

Sgt. G. McGougan said in "no way" was he looking for a Sony portable color TV, and Officer Tiegen said he was looking for "anything with a screen on it." Yet, it was McGougan who asked Tiegen to write down the serial numbers.

The state contends that the officers felt that the TV set was "incongruent" or totally out of place in that setting. McGougan testified that, under the existing circumstances, it was something that one would normally think would be stolen.

Neither of the officers knew exactly what they were looking for and would therefore not have been able to procure a search warrant until they acquired a specific description of the articles. Since the TV set in question was not one of the articles involved in the burglary of Liberty High School, had the officers gotten a search warrant, would they have been able to seize the serial numbers of the TV in question under the "plain view" doctrine? We decide in the negative.

Exceptions to the seizure of property without a warrant must be carefully scrutinized. The officers had gone by the TV set once without notable concern when entering the premises; they had no specific knowledge that another TV set was involved in the burglary and it was only when they were about to leave that McGougan asked Tiegen to take down the serial numbers. The conclusion that the TV set was incongruent in that setting does not convince the court. In today's society it is difficult to imagine any home without a TV set, or even a color TV. Mere suspicion alone, under the plain-view doctrine, does not rise to the dignity of being an exception to the fourth amendment to the United States Constitution, or article 1, section 7 of the Washington State Constitution.

The officers did not possess the requisite *immediate* apparent knowledge upon which they could reasonably conclude under the "plain view" doctrine they had incriminating knowledge before them, as required by *Coolidge v. New Hampshire, supra.*

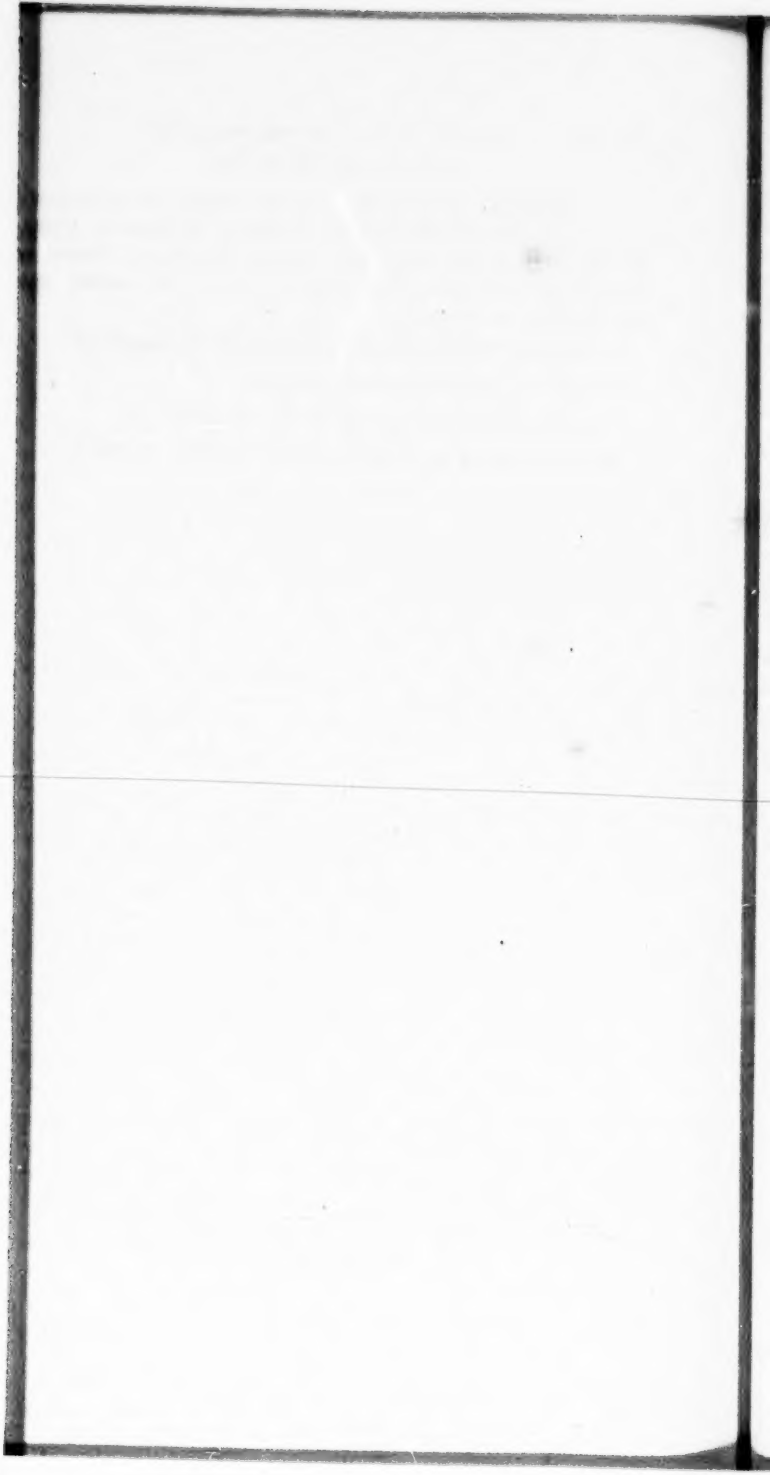
The admission of the TV being the "fruit" of the unlawful search, it should have been excluded. *McNear v. Rhay*, 65 Wn.2d 530, 398 P.2d 732 (1965). Therefore, there is insufficient evidence, as a matter of law, to sustain the charge of grand larceny.

Judgment reversed and the information is dismissed.

GREEN, C.J., and MUNSON, J., concur.

Petition for rehearing denied July 5, 1973.

Review granted by Supreme Court October 26, 1973.



APPENDIX "C"

In the Supreme Court
OF THE
STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

vs.

JOHN MURRAY et al.,

Respondents.

No. 42897

Department

ORDER
DENYING
PETITION FOR REHEARING

The Court having considered the petitioner's petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 16th day of December, 1974.

By the Court:

FILED
SUPREME COURT
STATE OF WASHINGTON
74 DEC 18 AM 1:44
RANDOLPH H. LOGAN
CLERK
DEPUTY

Chief Justice

84 Wn.2d 527